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An Introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

Frans Viljoen*

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I. Introduction: The Context

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol or Protocol)¹ is

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a legally binding multilateral supplement to the African Charter on Human and Peoples' Rights (African Charter),² adopted in July 2003 by the African Union Assembly of Heads of State and Government.³ Also referred to as the "Maputo Protocol," alluding to the place of its adoption, the Protocol entered into force on November 25, 2005.⁴ By June 30, 2009, it had been ratified by 27 of the 53 members of the African Union (AU),⁵ all of which are also States Parties to the African Charter.⁶

The adoption of the Protocol should be understood against the broader contemporaneous political, legal, and social background. The substance of the Protocol did not come to be adopted in isolation from these factors—it does not exist in a vacuum—and its implementation will take place in a specific, yet changing, context. Its adoption testifies to the greater visibility and mobilizing strength of women's organizations in Africa and is the culmination of a dual drafting process: one initiated by the women's movement and one steered by the "Inter-African Committee on Harmful Traditional Practices Affecting Women's and Children's Health."⁷

As an instrument adopted by the AU, the Protocol derives its legal authority principally from the AU Constitutive Act.⁸ The AU was

1. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, *adopted* July 11, 2003, reprinted in Martin Semalulu Nsibirwa, *A Brief Analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights in Africa*, 1 AFR. HUM. RTS. L.J. 40, 53 (2001) [hereinafter African Women's Protocol].

2. African Charter on Human and Peoples' Rights (27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986 [hereinafter African Charter].

3. African Women's Protocol, *supra* note 1.

4. *Id.*

5. See List of Countries Which Have Signed, Ratified/Accessed to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, <http://www.africaunion.org/root/au/Documents/Treaties/List/Protocol%20on%20the%20Rights%20of%20Women.pdf> (listing the States Parties as: Angola, Benin, Burkina Faso, Cape Verde, Comoros, Democratic Republic of Congo, Djibouti, The Gambia, Ghana, Guinea-Bissau, Lesotho, Liberia, Libya, Malawi, Mali, Mauritania, Mozambique, Namibia, Nigeria, Rwanda, Senegal, Seychelles, South Africa, Tanzania, Togo, Zambia, and Zimbabwe).

6. See African Charter, *supra* note 2, Art. 1.

7. See, e.g., Rachel Murray, *Women's Rights and the Organization of African Unity and African Union: The Protocol on the Rights of Women in Africa*, in INTERNATIONAL LAW: MODERN FEMINIST APPROACHES 253, 262 (Doris Buss & Ambreena Manji eds., 2005) (describing the experts' meetings and draft protocols before the Protocol was finally adopted in July 2003).

8. See Constitutive Act of the African Union, OAU Doc. CAB/LEG/23.15 *entered into force* May 26, 2001 *available at* http://www.africa-union.org/root/au/AboutAU/Constitutive_Act_en.htm (last visited Nov. 13, 2009) [hereinafter AU Constitutive Act] (on file with Washington and Lee Journal of Civil Rights and Social Justice). The AU

established in 2002 at its inaugural meeting in Durban, South Africa, thereby replacing the Organisation of African Unity (OAU). It is upon the highest AU organ, the Heads of State and Government, that its adoption rests, and on which sanctions against States Parties for non-implementation ultimately depends.⁹

Although the AU Constitutive Act represents a significant departure from the 1963 OAU Charter—in particular by including the "promotion of gender equality" as one of its foundational *principles*¹⁰—the omission of a similar provision from its list of *objectives*, and the use of the term Chairperson soon thereafter, elicited the adoption of an amendment to the Constitutive Act.¹¹ Increased concern for gender mainstreaming was also evident in the inaugural meeting of the newly constituted AU.¹² Although it was itself still an exclusively male body,¹³ the Assembly decided that the election of members of the AU Commission in the future should be based on a 50/50 parity principle.¹⁴ In its subsequent practice, the AU adhered rigorously to this directive.¹⁵ However, no similar stipulation is in place in respect of the two principal positions—those of Chairperson and Vice-Chairperson of the AU Commission.¹⁶ These positions have, as yet, only been held by men.¹⁷ The election of members of the African Commission on Human and Peoples' Rights (African Commission) has come to reflect

Constitutive Act was adopted in Lomé, Togo, on 11 July 2000, and entered into force on 26 May 2001. By mid 2003, all 53 OAU members became members of the AU.

9. See *id.* Art. 23 (describing the imposition of sanctions on Member States).

10. *Id.* Art. 4(1).

11. See Protocol on Amendments to the Constitutive Act of the African Union, www.africa-union.org (follow the "Documents: Treaties, Conventions & Protocols" hyperlink; then follow "Protocol on Amendments to the Constitutive Act of the African Union" hyperlink) which was adopted on 11 July 2003, in Maputo, Mozambique. See also *id.* Art. 3(i) (proposing the addition of the objective to "ensure the effective participation of women in decision-making particularly in the political, economic and socio-economic areas"); *id.* Art. 6 (substituting the word "Chairman" for "Chairperson"). By 30 June 2009, only 25 states have ratified the amending Protocol, which will only enter into force once two-thirds of members states have become States Parties thereto.

12. See FRANS VILJOEN, *INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA* 204 (2007) (explaining that the appointment of five female Commissioners was a move towards reaching gender equality).

13. Ellen Johnson-Sirleaf became the first elected female head of state when she took office as President of Liberia January 16, 2005. *Id.* at 266.

14. *Id.*

15. *Id.*

16. See *id.* at 266–67 (explaining that despite the improvements, the "the two highest office bearers during the first term of appointment were still male").

17. *Id.*

the parity principle; in fact in 2008/2009, its Chairperson (Justice Sanji Monageng), Vice-Chairperson (Angela Melo), and Secretary (Dr. Mary Maboreke) were all female.¹⁸ By contrast, despite a founding document calling for "adequate gender representation in the nomination process,"¹⁹ the AU only managed to elect two female judges out of eleven judges total to the African Court on Human and Peoples' Rights (African Human Rights Court).²⁰

Soon after the adoption of the Protocol in July 2004, the AU Assembly also adopted the AU Solemn Declaration on Gender Equality in Africa (AU Solemn Declaration).²¹ The Solemn Declaration contains a non-binding commitment by states to ensure progress towards the promotion and protection of women's rights in a number of clearly demarcated areas including HIV and AIDS, conflict prevention and management, gender-based violence, and development.²² Its targeted nature is arguably eroded by the inclusion of a very broad paragraph requiring states to ensure "the active promotion and protection of all human rights for women and girls including the right to development by raising awareness or by legislation if necessary."²³ In the AU Solemn Declaration, states were also urged to ratify the African Women's Protocol in order to ensure its entry into force in 2005.²⁴ Considering that only three states had ratified the Protocol when this call was made, and that the number increased to fifteen before the end

18. *Id.* Although the African Commission was initially all-male, the first female member was elected in 1993 and by 1999 the number grew to four and by 2004 to five. *Id.*

19. See Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights Art. 12(2), Jan. 25, 2004, available at <http://www.africa-union.org/root/au/Documents/Treaties/Text/africancourt-humanrights.pdf> [hereinafter African Human Rights Court Protocol] (noting that State Parties should give "due consideration" to gender representation when nominating candidates). If a limited number of female candidates are nominated, as was the case in the nominating process for judges, the AU Assembly was constrained in its ability to make gender-sensitive choices. CITE.

20. See, e.g., VILJOEN, *supra* note 12, at 433–34 (describing the minor role women played in the nomination and election process).

21. See AU Solemn Declaration on Gender Equality in Africa, in COMPENDIUM OF KEY HUMAN RIGHTS DOCUMENTS OF THE AFRICAN UNION 138 (Christof Heyns & Magnus Killander eds., 2007) available at http://www.africa-union.org/root/au/Conferences/Past/2006/October/WG/SOLEMN_DECLARATION_ON_GENDER_EQUALITY_IN_AFRICA.doc (last visited Nov. 13 2009) (follow: "Solemn Declaration on Gender Equality in Africa" hyperlink) [hereinafter AU Solemn Declaration] (on file with Washington and Lee Journal of Civil Rights and Social Justice).

22. *Id.* Preamble.

23. *Id.* at ¶ 6.

24. *Id.* at ¶ 9.

of 2005,²⁵ there was clearly an acceleration in the rate of ratification subsequent to the adoption of the Solemn Declaration. All AU member states committed themselves to reporting annually at meetings of Heads of State and Government about progress made towards fulfilling the promises made under the Solemn Declaration.²⁶ Although this obligation is thus placed on all AU members states irrespective of the treaties they have ratified "to date only seven states [Algeria, Ethiopia, Lesotho, Namibia, Senegal, South Africa and Tunisia] have submitted their reports."²⁷ The AU Chairperson also has to submit an annual report on progress in realizing the objectives set out in the Declaration.²⁸

In 2009, the AU went further along the path of mainstreaming gender into its activities by adopting a Gender Policy.²⁹ The AU Gender Policy contains eight commitments relating to the creation of a political environment conducive to adherence with the 50/50 gender parity principle, the mobilization of resources to implement the Gender Policy, gender mainstreaming, and the effective participation of women in peacekeeping.³⁰ The Gender Policy makes specific reference to the Protocol and encourages both its further ratification and its early domestication by all AU member states.³¹

Institutionally, the AU Commission established a Women and Gender Development Directorate within the Office of the Chairperson of the AU Commission.³² The mandate of the Directorate is to build the capacity of "AU organs, RECs and members states to understand gender, develop skills for achieving gender mainstreaming targets and practices in all policy and

25. See *supra* note 5 (listing the names of countries that have ratified of adopted the Protocol and the date they did so).

26. AU Solemn Declaration, *supra* note 21, at ¶ 13.

27. Implementation of the Solemn Declaration on Gender Equality in Africa, <http://www.africa-union.org/root/au/Conferences/Past/2006/October/WG/doc.htm> (last visited Oct. 11, 2009) (on file with Washington and Lee Journal of Civil Rights and Social Justice).

28. *Id.*

29. See African Union Gender Policy, Rev 2, 10 Feb. 2009, <http://www.africa-union.org/root/AU/AUC/Departments/GE/African%20Union%20gender%20Policy.doc> (explaining that the Statutes place the internal gender workings with the Chairperson of the Commission who has the goal and responsibility of mainstreaming gender) [hereinafter AU Gender Policy].

30. *Id.* at 13.

31. *Id.* at 14.

32. See, e.g., RACHEL MURRAY, HUMAN RIGHTS IN AFRICA: FROM THE OAU TO THE AFRICAN UNION, 155–56 (2004) (discussing the structures related to women within the AU).

programme processes and actions by 2010."³³ The AU's developmental blueprint, the New Partnership for Africa's Development (NEPAD), and the related African Peer Review Mechanism (APRM), also reiterate crucial features of the Protocol, such as women's role in decision-making and conflict resolution and access to reproductive services.³⁴

At the sub-regional level, most of the sub-regional economic communities have also established Gender Units. The most prominent development has been in Southern Africa where the Southern African Development Community (SADC) in August 2008 adopted the SADC Protocol on Gender and Development (SADC Gender Protocol).³⁵ The SADC Gender Protocol, which has been signed by 12 of the 15 SADC member states,³⁶ will enter into force after it is ratified by two-thirds of these states.³⁷ So far, no SADC member state has ratified the SADC Gender Protocol. This Protocol grew out of a binding instrument bearing a closely related declaration (the SADC Declaration on Gender and Development of 1997) and a supplement thereto (the Addendum on the Prevention and Eradication of Violence against Women and Children of 1998).³⁸

II. Supplementing the Substantive Basis

According to its Preamble, the Protocol was adopted to address the concern that "despite the ratification of the African Charter on Human and

33. AU Gender Policy, *supra* note 29, at 4.

34. See Country Self-Assessment for the African Peer Review Mechanism, ¶ 1.3.1 (Objective 7), <http://www.uneca.org/aprm/Documents/Questionnaire.pdf>. (explaining the need for women to have a "meaningful status in the country" where they can adequately participate in society such that it may be demonstrated by producible evidence).

35. SADC Protocol on Gender and Development, [http://www.cladem.org/english/news/Protocol%20on%20Gender%20August%202008%20-%20English0001\(4\).pdf](http://www.cladem.org/english/news/Protocol%20on%20Gender%20August%202008%20-%20English0001(4).pdf) [hereinafter SADC Gender Protocol].

36. South African Development Community, <http://www.africa-union.org/root/au/recs/sadc.htm> (listing the signed onto the SADC Gender Protocol: Botswana, Mauritius and Malawi and explaining that the Gender Protocol has not been ratified by any of the other twelve SADC member states (Angola, Democratic Republic of Congo, Lesotho, Madagascar, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe)) (on file with Washington and Lee Journal of Civil Rights and Social Justice).

37. SADC Gender Protocol, *supra* note 35, Art. 40–41.

38. See Fareda Banda, *Blazing a Trail: The African Protocol on Women's Rights Comes into Force*, 50 J. AFR. L. 72, 74 (2006) (explaining the drafting process of the African Women's Protocol).

Peoples' Rights and other international human rights instruments by the majority of State Parties . . . women in Africa still continue to be victims of discrimination and harmful practices."³⁹ Therefore, the Protocol should not be viewed primarily as correcting normative deficiencies in international human rights law dealing with women's rights, but rather as a response to the lack of implementation of these norms.⁴⁰

At the time of the drafting and adoption of the Women's Protocol, the two main instruments of particular relevance to the rights of women in Africa (the African Charter and the UN Convention on the Elimination of all forms of Discrimination against Women (CEDAW)⁴¹), enjoyed universal and near-universal ratification in Africa, respectively.⁴² The African Charter on the Rights and Welfare of the Child (African Children's Charter), which deals with the rights of children under the age of 18 including the girl-child, enjoyed less state support.⁴³ Subsequent to the adoption of the African Women's Protocol, two further instruments of limited relevance to women in Africa have been adopted. The AU Solemn Declaration on Gender Equality in Africa⁴⁴ was adopted, but it is a non-binding declaration and is limited in its legal effect even though it is extensive in its reach to all AU members. The other instrument, the SADC Gender Protocol,⁴⁵ is potentially binding on AU members, but only on those within the SADC region that have ratified it.

The substantive symmetry (in terms of overlap and peculiarity) between the African Women's Protocol, on the one hand, and each of these five instruments, on the other, will now be reviewed. The aim is not to

39. See African Women's Protocol, *supra* note 1, Preamble.

40. See Banda, *supra* note 38, at 77 ("To break the deadlock, the drafters agreed to make the right subject to national law, which solution constitutes a usurpation of international law principles.").

41. UN Convention on the Elimination of all forms of Discrimination against Women [hereinafter CEDAW].

42. African Charter, *supra* note 2; Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (1980) [hereinafter CEDAW].

43. See VILJOEN, *supra* note 12, at 265 (explaining that the nature of some Charter provisions are more relevant to children but the Commission has not received any allegations of violations of such children's rights and "the initial reporting guidelines do not devote much attention to children's rights"). By June 2003, only 31 states has become party to the Children's Charter; by 30 June 2009, that number has increased to 45.

44. AU Solemn Declaration, *supra* note 21.

45. SADC Gender Protocol, *supra* note 35.

provide a comprehensive picture, but merely to shed light on the most prominent overlapping and distinguishing features of these instruments.

A. Women's Protocol: African Charter

From the 1990s, women's rights started to receive more attention in the African Commission. Institutionally, this focus culminated in the establishment of the position of the Special Rapporteur on the Rights of Women in Africa, in 1998.⁴⁶ At that stage, a process of elaborating an African instrument on women's rights was already under way. Spearheaded by an increasingly vocal and visible African women's rights movement, debate about the need for an additional instrument to extend the scope and content of women's rights in the African Charter increased, and the notion of a substantive supplement to the Charter gathered momentum. Not all participants in the discussion supported the adoption of an additional instrument. Under the Charter, it was argued, *everyone* is a rights-bearer, not *every man*.⁴⁷ Article 2 of the Charter reinforces that the rights in the Charter (including the right to dignity, bodily security, and education, to name but a few of them that may resonate in women's lives), are to be enjoyed without any discrimination on the basis of sex, among other grounds.⁴⁸ In Article 18(3), the Charter specifically mentions the duty of States Parties to "ensure the elimination of every discrimination against women."⁴⁹ Against this background, it was argued that the real problem lay in the lack of the utilization of the available system by women or on their behalf, and that the potential of the Charter should be unlocked by campaigning for the adoption of resolutions ("General Comments") on rights of relevance to women.⁵⁰ This argument found support in the generally progressive and expansive interpretive approach of the

46. See VILJOEN, *supra* note 12, at 224 ("The appointment of one of the members of the Commission as Special Rapporteur on Children in Africa will go a long way towards ensuring that the right set out in the African Children's Charter are not neglected to the Commission's work.").

47. African Charter, *supra* note 2, Preamble.

48. *Id.* Art. 2.

49. *Id.* Art. 18(3).

50. See, e.g., CORINNE A. PACKER, USING HUMAN RIGHTS TO CHANGE TRADITION: TRADITIONAL PRACTICES HARMFUL TO WOMEN'S REPRODUCTIVE HEALTH IN SUB-SAHARA AFRICA 127-29 (2002) ("Additional interpretive measures to the African Charter would improve the protection of African women's rights While the Commission has never issued a General Comment, it is not precluded.").

Commission, which suggested that such an approach would be likely to succeed if fully explored.⁵¹ Little has also been done to explore the possibility of the individual communications procedure in respect of women. Before adopting a new treaty, the argument is that the normative and institutional potential of the existing system should be used to its full potential.

However, the argument for a new substantive shield for women in Africa won the day. Article 18(3) was criticized for its conflation of the rights of women with those of children, the aged, and the disabled, and for being situated in an article that primarily deals with the family.⁵² In addition, the majority were convinced that an African instrument would provide more specificity, serve as a clear yardstick for assessing government action, act as lobbying tool, and denote African ownership.⁵³

Eventually adopted in 2003, the Protocol "brings into the open the Charter's shrouded premise that women are included in its protective scope."⁵⁴ As a supplement to the African Charter, the Protocol attempts to underline the rights for women enumerated in the Charter and to elaborate upon their relevance. In doing so, however, the Protocol does not enter into a systematic engagement with each of the Charter rights.⁵⁵ As a consequence, it has been argued that the choice of provisions of the Protocol leaves an eclectic impression.⁵⁶ Without a clear rationale, some

51. See, e.g., *Media Rights Agenda and Others v. Nigeria*, 2000 AFR. HUM. RTS. L. REP. 200, available at http://www.chr.up.ac.za/centre_publications/ahrlr/ahrlr_2000.html (last visited Nov. 13 2009) (demonstrating the African Commission's progressive approach to the interpretation of the "claw-back" provisions in the Charter) (on file with Washington and Lee Journal of Civil Rights and Social Justice); see also *Social and Economic Rights Action Centre (SERAC) and Another v. Nigeria*, 2001 AFR. HUM. RTS. L. REP. 60, 71–72, available at http://www.chr.up.ac.za/centre_publications/ahrlr/ahrlr_2001.html (last visited Nov. 13 2009) (noting the African Commission's reading in of the right to shelter and food into the African Charter) (on file with Washington and Lee Journal of Civil Rights and Social Justice).

52. See, e.g., Winston Langley, *The Rights of Women, the African Charter, and the Economic Development of Africa*, 7 B.C. THIRD WORLD L.J. 215, 216–17 (1987) (explaining how Article 18 merely incorporates the rights of women and children by reference).

53. But see Murray, *supra* note 7 (explaining that other than acting as a "promotional tool" it was unclear how the Protocol was different from past documents and standards or what else it intended to add to those documents).

54. Viljoen, *supra* note 12, at 271.

55. See Murray, *supra* note 7, at 265 (explaining the inconsistency of which provisions were incorporated or rejected in the Protocol).

56. See *id.* at 264 ("[T]he Protocol wavers between being an interpretation of the ACHPR for women on the one hand, and a collection (not a comprehensive one) of some existing international standards on the other. It ends up falling short of both these

rights received much less attention. For example, a women's right to property has been subsumed into other rights.⁵⁷

By providing for rights of both a civil-political and socio-economic nature, the Protocol confirms the Charter's premise that rights are indivisible and interdependent. In fact, the Protocol, basing itself implicitly on the Commission's jurisprudence, goes beyond the scope of the rights provided for under the African Charter by including the right to food security⁵⁸ and adequate housing.⁵⁹ The Protocol also extends the scope of the right to health by requiring states to take "appropriate measures" to make health services accessible particularly to rural women.⁶⁰ Although it explicitly includes the need to strengthen "pre-natal, delivery and post-natal health . . . services"⁶¹ under this obligation, it does not go as far as to stipulate the desired outcome of a reduction in maternal and infant mortality.

The Protocol is inconsistent with its predecessor, the African Charter, because it omits two of the overriding features of the Charter: (1) that rights-bearers are not only individuals but also "peoples" and (2) individual duties are named alongside individual rights.⁶²

Clearly, women are included in the group "peoples" as the term is used in the Charter.⁶³ Perhaps conscious of the complexities that may be introduced by earmarking women as a collective, the Protocol refrains from doing so, although it restates some of the peoples' rights in the Charter as they apply to women. The right to peace is a prime example: In the Protocol, the Charter right of "peoples" to an unspecified "national and international peace"⁶⁴ is converted into the right of "women" to "the

objectives.").

57. See African Women's Protocol, *supra* note 1, Arts. 7(d), 19(c) (providing examples of such property rights which were incorporated).

58. See African Women's Protocol, *supra* note 1, Art. 15 ("State Parties shall ensure that women have the right to nutritious and adequate food.").

59. See *id.* Art. 16 ("Women shall have the right to equal access to housing and to acceptable living conditions in a healthy environment.").

60. *Id.* Art. 14(2)(a).

61. *Id.* Art. 14(2)(b).

62. See, e.g., Danwood Mzikenge Chirwa, *Reclaiming (Wo)manity: The Merits and Demerits of the African Protocol on Women's Rights*, 53 NETHERLANDS INT'L L. REV. 63, 94-95 (2006) (explaining how the Charter fails to articulate a consistent African approach).

63. See African Charter, *supra* note 2 (using the word "peoples" rather than a more specifically defined term).

64. *Id.* Art. 23.

promotion and maintenance of peace."⁶⁵ As women are already recognized as a collective in many provisions of the Protocol,⁶⁶ it is not clear what advantages would have been achieved by earmarking them as a "people." In my view, such an approach would just have exacerbated the already-existing confusion about the term "peoples" in the Charter.

Individual duties are not explicitly featured in the Protocol. In my view, this omission is in line with the insight that the Charter experience showed that these provisions (which are mostly moral imperatives) are largely redundant in the legal text of the Charter. Some mention of the reciprocity of rights and duties could have been made in the Preamble, but it could also be argued that such invocation would be a mere restatement of the Charter.

B. Women's Protocol: CEDAW

Although the African Women's Protocol has been drafted as an addition to the African Charter and not as a response to CEDAW, the Protocol invites comparison with CEDAW, being the main UN treaty on women's rights. Compared to CEDAW, the Protocol speaks in a clearer voice about issues of particular concern to African women, locates CEDAW in African reality, and returns into its fold some casualties of quests for global consensus, resulting from the adoption of CEDAW. More specifically, the Protocol expands the scope of protected rights beyond those provided for under CEDAW and it deals with rights already covered in CEDAW with greater specificity. Importantly, it emphasizes the private sphere as an important domain in which rights are to be realized and it underlines the need for "positive action."⁶⁷

The Protocol expands the protective scope of women's rights by addressing numerous issues of particular concern to African women that were not included in CEDAW. The Women's Protocol is the first treaty to provide for the right to circumscribed "medical abortion."⁶⁸ It is also the

65. African Women's Protocol, *supra* note 1, Art. 10(1).

66. *See id.* Arts. 10, 16–19 (recognizing rights and duties specifically for "individuals, children, and parents" creating an "obligation to treat another with respect and without discrimination").

67. *See id.* Art. 2 (listing the actions for combating "all forms of discrimination against women").

68. *See id.* Art 14(2)(c) (requiring states to authorize "abortion in cases of sexual assault, rape, incest, and where a continued pregnancy" threatens the health of the mother or the life of the fetus).

first binding treaty to provide for the right of a woman to be protected against HIV infection and to know the HIV status of her sexual partner.⁶⁹ The drafting history of the Protocol testifies to the contentious nature of polygamy. Although initial drafts called for its abolition, the Protocol places an obligation on States Parties to encourage monogamy.⁷⁰ A necessary implication of targeting violence against women and "unwanted or forced sex" in the private sphere is that the Protocol requires domestic violence legislation and the criminalization of rape in marriage.⁷¹ States are under an obligation to enact and enforce laws prohibiting domestic violence.⁷² Compared to CEDAW, the Protocol provides in greater detail for the "protection of women in armed conflict,"⁷³ and reiterates the need to accord women refugees the protection under international law.⁷⁴ Under the Protocol, the girl-child may, in particular, not be recruited or "take a direct part in hostilities."⁷⁵ State parties to the Protocol must set the "minimum age of marriage" at 18, and all marriages must "be recorded in writing."⁷⁶

The Protocol provides specificity where vagueness prevailed, for example when it clarifies that "positive African cultural values"⁷⁷ are those "based on the principles of equality, peace, freedom, dignity, justice, solidarity and democracy."⁷⁸ It also spells out the scope of socio-economic rights in greater detail than CEDAW, which limited some socio-economic rights to "rural women."⁷⁹ Under the Protocol, women have the "right to

69. *See id.* Art. 14(1)(d) (stating that states have to ensure that women are "protected against sexually-transmitted diseases, including HIV/AIDS"); *id.* at art 14(1)(e) (requiring states to ensure that women are informed of the HIV status of their partners "in accordance with internationally recognized standards").

70. *See id.* Art. 6(c) (noting that the rights of women in polygamous marital relationships must be promoted and protected). In previous drafts, polygamy was totally outlawed. But in the final Protocol a watered-down compromise was adopted, allowing polygamy to persist with a guarantee of women's protection, combined with an encouragement of monogamy as the preferred form of marriage.

71. *Id.* Art. 4(2)(a).

72. *See id.* Art. 4(2) (calling on states to prohibit violence against women "in private or public").

73. *Id.* Art. 11.

74. *Id.* Art. 11(3).

75. *Id.* Art. 11(4).

76. *Id.* at Arts. 6(b), 6(d).

77. African Charter, *supra* note 2, Art. 29(7).

78. African Women's Protocol, *supra* note 1, Preamble.

79. *See* CEDAW, *supra* note 42, Art. 14 (stating the economic problems rural women face and the measures taken to eliminate that form of discrimination).

food security,"⁸⁰ and to "adequate housing."⁸¹ In addition, the state parties must reduce military spending in favor of social spending, particularly on women.⁸²

The precarious position of groups of women that have been rendered particularly vulnerable due to the loss of a spouse,⁸³ old age,⁸⁴ disability,⁸⁵ and poverty⁸⁶ also receives the Protocol's attention. The Women's Protocol addresses multiple oppressions that some women face on the grounds of gender as well as disability, poverty, and "the loss of a spouse overlap with old age."⁸⁷

Adopting a distinctly transformative stance, the Protocol emphasizes "corrective" and "specific positive" (or "affirmative") action. While CEDAW contains a generic provision allowing for "temporary special measures aimed at accelerating de facto equality between men and women,"⁸⁸ the Protocol reiterates the need for positive measures by locating them in different contexts. Pre-empting arguments based on formal equality, the Protocol requires states to adopt measures that may favor women above men, such as electoral quotas for women, in order to ensure substantive ("in fact") equality.⁸⁹ Positive action is also specifically required with regard to discrimination in law,⁹⁰ illiteracy, and education.⁹¹

It may be argued that the differences between the Protocol and CEDAW are more apparent than real because in general comments, resolutions, concluding observations, and findings, the CEDAW Committee has expanded the scope of the relevant treaties. However, even if these clarifications have considerable persuasive weight, they do not constitute binding obligations. By making those "clarifications" unequivocally binding—and by supplementing them—the Women's Protocol takes an undeniable normative step forward.

80. African Women's Protocol, *supra* note 1, Art. 15.

81. *Id.* Art. 16.

82. *Id.* Art. 10(3).

83. *See id.* Art. 20 (describing the rights of women who are widows).

84. *See id.* Arts. 21–22 (describing the rights women have to an inheritance and the "special protection of elderly women").

85. *See id.* Art. 23 (describing the "special protection of women with disabilities").

86. *See id.* Art. 24 (describing the "special protection of women in distress").

87. *Id.*

88. CEDAW, *supra* note 42.

89. African Women's Protocol, *supra* note 1, Art. 9(1).

90. *Id.* Art. 2(1)(d).

91. *Id.* Art. 12(2).

C. Women's Protocol: African Children's Charter

The obvious overlap between the Protocol and the African Charter on the Rights and Welfare of the Child (African Children's Charter)⁹² arises from the scope of the two instruments: The Protocol covers all "persons of female gender, including girls,"⁹³ without setting any age limitation and the African Children's Charter deals with "every human being below the age of 18 years."⁹⁴ From the point of view of the "girl-child," both treaties are therefore potentially relevant.

In so far as they both explicitly deal with the girl-child, the two instruments are largely similar. The African Children's Charter stipulates eighteen as the minimum age of marriage,⁹⁵ a threshold that was subsequently introduced into the Protocol.⁹⁶ The same applies to the further requirement that all marriages must be recorded in writing.⁹⁷ The Protocol also echoes the obligation of states party to the African Children's Charter to take "all necessary measures to ensure that no child [] take[s] a direct part in hostilities,"⁹⁸ adding the phrase: "Especially girls under 18 years of age."⁹⁹

When it was adopted, the African Children's Charter presented a significant advance on existing international human rights law, both in comparison to the African Charter and the UN Convention on the Rights of the Child. By restating these provisions, the African Women's Protocol essentially solidifies and reinforces this progress.

D. Women's Protocol: Solemn Declaration

In its eight substantive paragraphs directed at the domestic arena of states, the Solemn Declaration addresses nine specific areas of domestic law and practice. Each of these areas resonates with a particular provision,

92. African Charter on the Rights and Welfare of the Child, Organization of African Unity Doc. CAB/LEG/24.9/49 (1990), *entered into force* Nov. 29, 1999 [hereinafter African Children's Charter].

93. African Women's Protocol, *supra* note 1, Art. 1(k).

94. African Children's Charter, *supra* note 92, Art. 2.

95. *See id.* Art. 21(2) ("Child marriage and the betrothal of girls and boys shall be prohibited . . .").

96. African Women's Protocol, *supra* note 1, Art. 6(b).

97. *Id.* Art. 6(d); African Children's Charter, *supra* note 92, Art. 21(2).

98. African Children's Charter, *supra* note 92, Art. 22(2).

99. African Women's Protocol, *supra* note 1, Art. 11(4).

or provisions, in the Protocol, addressing: (1) the impact of HIV and AIDS on women;¹⁰⁰ (2) the inclusion of women in peace processes and post-conflict reconstruction;¹⁰¹ (3) the prohibition of recruitment of child soldiers;¹⁰² (4) the prohibition of the abuse of women as wives and sex slaves;¹⁰³ (5) public awareness and sensitization about gender-based violence and trafficking in women;¹⁰⁴ (6) observance of the parity principle in elections at the national and local level;¹⁰⁵ (7) the promotion and protection of women's rights, including, in particular, the right to development;¹⁰⁶ (8) "the implementation of legislation to guarantee

100. Compare AU Solemn Declaration, *supra* note 21, at ¶ 1 ("Accelerate the implementation of gender specific economic, social, and legal measures aimed at combating the HIV/AIDS pandemic and effectively implement both Abuja and Maputo Declarations on Malaria, HIV/AIDS, Tuberculosis and Other Related Infectious Disease."), with African Women's Protocol, *supra* note 1, Arts. 14(1)(d), 14(1)(e) ("[T]he right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS."). Article 14 of the African Women's Protocol, is much more focused and only deals with the right to "self-protection" and the right to be informed of the status of a sexual partner. However, it could be assumed that these aspects would be subsumed in the more general scope of the Solemn Declaration.

101. Compare AU Solemn Declaration, *supra* note 21, at ¶ 2 ("Ensure the full and effective participation and representation of women in peace process including the prevention, resolution, management of conflicts and post-conflict reconstruction in Africa . . ."), with African Women's Protocol, *supra* note 1, Art. 10 (showing closer congruence with the Solemn Declaration).

102. Compare AU Solemn Declaration, *supra* note 21, at ¶ 3 ("Launch . . . campaign for systematic prohibition of the recruitment of child soldiers . . ."), with African Women's Protocol, *supra* note 1, Art. 11(4) ("States Parties shall take all necessary measures to ensure that no child, especially girls under 18 years of age, take a direct part in hostilities and that no child is recruited as a soldier.").

103. Compare AU Solemn Declaration, *supra* note 21, at ¶¶ 2, 3 ("Launch . . . campaign for systematic prohibition of . . . abuse of girl children as wives and sex slaves . . ."), with African Women's Protocol, *supra* note 1, Arts. 3(3), 3(4), 4(2)(g) (prohibiting "exploitation or degradation of women").

104. Compare AU Solemn Declaration, *supra* note 21, at ¶ 4 ("Initiate, launch and engage . . . sustained public campaigns against gender based violence as well as the problem of trafficking in women and girls . . ."), with African Women's Protocol, *supra* note 1, Arts. 2(2), 4(2)(f) ("[E]stablish mechanisms and accessible services for effective information, rehabilitation and reparation for victims of violence against women.").

105. Compare AU Solemn Declaration, *supra* note 21, at ¶ 5 ("Expand and Promote the gender parity principle that we have adopted regarding the Commission of the African Union . . ."), with African Women's Protocol, *supra* note 1, Art. 9(1)(b) (ensuring that "women are represented equally at all levels with men in all electoral processes").

106. Compare AU Solemn Declaration, *supra* note 21, at ¶ 6 ("Ensure the active promotion and protection of all human rights for women and girls including the right to development by raising awareness or by legislation where necessary."), with African Women's Protocol, *supra* note 1, Art. 19 ("Women shall have the right to fully enjoy their right to sustainable development.").

women's land, property, inheritance," and housing rights;¹⁰⁷ and (9) the need to ensure the right to education for children, and literacy for women.¹⁰⁸

E. Women's Protocol: SADC Gender Protocol

A comparison between the Women's Protocol and the SADC Gender Protocol reveals many similarities, but also some significant differences.

The SADC Gender Protocol deals with specific areas of domestic law and practice, many of which resonate with a particular provision in the Women's Protocol. For example, both provide for the adoption of constitutional rights¹⁰⁹ and domestic legislation.¹¹⁰ In some instances, the SADC Gender Protocol merely restates the provisions of the Women's Protocol, but often in a more elegant formulation. The provision on the rights of widows is a case in point.¹¹¹

However, there are also numerous differences, ranging from subtle to substantial. While the SADC Gender Protocol includes a separate provision on affirmative action, the Women's Protocol deals with "affirmative action" and "positive action" with respect to particular rights.¹¹² Both instruments cover the essential aspects of equality in accessing justice, and emphasize

107. Compare AU Solemn Declaration, *supra* note 21, at ¶ 7 ("Actively promote the implementation of legislation to guarantee women's land, property and inheritance rights including their rights to housing."), with African Women's Protocol, *supra* note 1, Arts. 6, 16 (dealing mainly with property rights in the context of marriage).

108. Compare AU Solemn Declaration, *supra* note 21, at ¶ 8 ("Take specific measures to ensure the education of girls and literacy of women . . ."), with African Women's Protocol, *supra* note 1, Art. 12 (discussing the right to education and training for women).

109. Compare SADC Gender Protocol, *supra* note 35, Art. 4 ("States Parties shall endeavour, by 2015, to enshrine gender equality and equity in their Constitutions and ensure that these rights are not compromised by any provisions, laws or practices."), with African Women's Protocol, *supra* note 1, Arts. 2(1)(a), 2(1)(b) (including principal of equality in national constitutions and calling for creation of legislation to curb discrimination against women).

110. Compare SADC Gender Protocol, *supra* note 35, Art. 6 (requiring equality in domestic legislation), with African Women's Protocol, *supra* note 1, Art. 2 (requiring elimination of discrimination against women in legislation).

111. See SADC Gender Protocol, *supra* note 35, Art. 10 (combining articles 20 and 21 of the African Women's Protocol); see also African Women's Protocol, *supra* note 1, Arts. 20, 21 (providing rights for widows and rights to inheritance).

112. Compare SADC Gender Protocol, *supra* note 35, Art. 5 ("States Parties shall put in place affirmative action measures with particular reference to women in order to eliminate all barriers which prevent them from participating meaningfully in all spheres of life . . ."), with African Women's Protocol, *supra* note 1, Art. 9(1) (promoting women's participation and representation in governance).

the need for legal aid for women.¹¹³ In addition, the Protocol stipulates that law enforcement organs must be equipped to deal with gender issues,¹¹⁴ and requires that women must be represented equally on these organs,¹¹⁵ while the SADC Gender Protocol emphasizes that the principles of equal access and representation for women should also apply in customary and traditional courts.¹¹⁶ Although the essence of marriage and family rights is similar in the two instruments, a striking difference is that the SADC instrument does not enter into the debate about monogamy versus polygamy.¹¹⁷

The SADC Gender Protocol departs most poignantly from existing instruments, including the Women's Protocol, in its setting of specified targets. In fact, one of the objectives of the SADC Gender Protocol is to set "realistic, measurable targets, time frames and indicators" to achieve gender equality.¹¹⁸ With respect to provisions that lend themselves to being reviewed by a particular date, such as those requiring the amendment or enactment of laws, the SADC Gender Protocol posits "by 2015" as the desired or determined time frame.¹¹⁹ These targets are sometimes very specific, for example, by requiring that by 2015 "at least fifty percent of decision-making positions in the public and private sectors are held by women."¹²⁰ Another important example is the obligation placed on state

113. Compare SADC Gender Protocol, *supra* note 35, Art. 7 (ensuring equality in accessing justice), with African Women's Protocol, *supra* note 1, Art. 8 ("Women and men are equal before the law and shall have the right to equal protection and benefit of the law").

114. See African Women's Protocol, *supra* note 1, Art. 8(d) (ensuring "that law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality rights").

115. *Id.* Art. 8(e).

116. See SADC Gender Protocol, *supra* note 35, Arts. 7(a), 7(f) (requiring female participation in courts and other judicial proceedings).

117. Compare *id.* Art. 8 (ensuring "women and men enjoy equal rights in marriage and are regarded as equal partners in marriage"), with African Women's Protocol, *supra* note 1, Art. 6 (discussing that men and women "are regarded as equal partners in marriage" and encouraging monogamy).

118. SADC Gender Protocol, *supra* note 35, Art. 3(d).

119. See *id.* Art. 4(1) ("States Parties shall endeavour, by 2015, to enshrine gender equality and equity in their Constitutions . . ."). "Desired time frame" is based on the wording of the SADC Gender Protocol, which stipulates that states "shall endeavour . . ." while "determined" refers to those instances where the Protocol places a much more direct obligation in the form of phrases such as "shall adopt" or "shall review." See *id.* Art. 6 ("States Parties shall review, amend and or repeal all laws that discriminate on the ground of sex or gender by 2015").

120. *Id.* Art. 12(1).

parties to reduce the "maternal mortality ratio by 75% by 2015."¹²¹ By identifying precise and tangible indicators, the SADC instrument has raised the bar of expectations, and has increased the accountability potential of the state reporting process.

Another difference relates to budgeting. Rather than stipulating a budgetary hierarchy, as the Women's Protocol did in its article 10(3), the SADC Gender Protocol requires all states to ensure "gender sensitive and responsive budgeting" at all levels of budgeting.¹²²

While the SADC Gender Protocol may have dealt more comprehensively with the HIV pandemic besetting the sub-region, its linking of gender-based violence with HIV is most appropriate, as is the obligation it places on states to provide "ready access to post exposure prophylaxis at all health facilities."¹²³ This is the first international treaty to encompass this obligation. While the African Women's Protocol focuses on two aspects (self-protection and the right to knowledge of a partner's HIV status),¹²⁴ the SADC instrument covers the issue more holistically, for example, by obliging states to "develop gender sensitive" prevention strategies.¹²⁵

Although the SADC Gender Protocol was inspired by the Women's Protocol, the sub-regional treaty surpasses its regional predecessor in its specificity. A comparison between the Women's Protocol and the SADC Gender Protocol illustrates that greater normative coherence among a small group of relatively homogeneous states can give rise to a more concrete formulation of rights and more targeted obligations on states.

121. *Id.* Art. 26(a). By contrast, the African Women's Protocol does not mention maternal mortality by the name.

122. Compare SADC Gender Protocol, *supra* note 35, Art. 15(2) ("States Parties shall ensure gender sensitive and responsive budgeting at the micro and macro levels, including tracking, monitoring and evaluation), with African Women's Protocol, *supra* note 1, Art. 10(3) ("States Parties shall take the necessary measures to reduce military expenditure significantly in favour of spending on social development in general, and the promotion of women in particular."). *But see* African Women's Protocol, *supra* note 1, Art. 26(2) (imposing an overarching obligation on states to allocate budgetary resources towards the implementation of the rights in the African Women's Protocol).

123. SADC Gender Protocol, *supra* note 35, Art. 20(2).

124. See African Women's Protocol, *supra* note 1, Arts. 14(1)(d), 14(1)(e) (discussing the right "to be protected against sexually transmitted infections").

125. See SADC Gender Protocol, *supra* note 35, Art. 27(1) ("States Parties shall take every step necessary to adopt and implement gender sensitive policies and programmes, and enact legislation, that will address prevention, treatment, care and support in accordance with, but not limited to, the Maseru Declaration on HIV and AIDS.").

F. Conclusion

In sum, even if they lack systemic coherence, the five instruments discussed here create a web of potential bases for legal protection and of intersecting advocacy routes for women in Africa. The emerging image of overlapping and connecting, yet often divergent, layers of protection giving rise to multiple possibilities underscores the portrayal of international law as a "superstore" or "warehouse of treaties, customs, international institutions and norms," rather than a coherent or closed system.¹²⁶ Although the lack of coherence may be troubling to some, and may cloud states' understanding of their obligations, collectively these norms constitute a significant advance in women's empowerment, and avail them of a wide range of possible normative routes on which to base future strategies.

Still, it is overly simplistic to think that all the rights conflate into a single "system." The treaties and other instruments remain distinct, with specific state parties, specified procedures, and particular mechanisms. While there may be substantial normative overlap, there will also be important distinctions between these instruments. In reconciling these instruments, their interrelationship should be guided by the principle that the most "favourable provisions for the realisation of the rights of women" prevails in cases of conflicting provisions.¹²⁷

Some gaps still remain. For example, the impact of HIV and AIDS on women has not been dealt with in sufficient detail. Although HIV is mentioned for the first time in the Women's Protocol, it is only in the SADC Gender Protocol that it is addressed in any meaningful way. Even there, the impact of HIV and AIDS on women's lives has not been fully accounted for. Silence still surrounds the position of marginalized women, such as lesbian and bisexual women, sex workers, and women belonging to indigenous minorities.

126. See Barbara Stark, *Women and Globalization: The Failure and Postmodern Possibilities of International Law*, 33 VAND. J. TRANSNAT'L L. 503, 508 (2000) ("From a 'postmodern perspective,' international law is best understood as a superstore, a warehouse of treaties, customs, international institutions and norms, as well as national laws intended to implement or to avoid them." (citations omitted)).

127. See African Women's Protocol, *supra* note 1, Art. 31 ("None of the provisions of the present Protocol shall affect more favourable provisions for the realisation of the rights of women contained in the national legislation of States Parties or in any other regional, continental or international conventions, treaties or agreements applicable in these States Parties.").

III. Improving Implementation

The overriding rationale for the adoption of the African Women's Protocol was the concern that, despite the ratification of international human rights instruments, women in Africa continue to be victims of discrimination and harmful practices.¹²⁸ The question about the "added value" of the Protocol, therefore, ultimately has to find its answer in improvements in the actual enjoyment of the relevant rights by women. The effect of the Protocol on women's lives depends, at the national level, on its effective domestication and available domestic remedies, and, at the regional level, on effective implementation by the African Commission. In this section, the extent to which the Protocol enhances and expands on existing domestic and regional implementation mechanisms is discussed before the threat to implementation posed by the possibility of reservations is considered.

A. Domestication and Domestic Legal Redress and Interpretation

Even if the Protocol is an international treaty, its effect has to be felt at the national level if it is to meet the basic rationale for its adoption, which is the full realization of the rights provided for under the Protocol.

As a legal instrument, this entails the availability of effective domestic legal and other remedies to rectify violations. Consciously addressing this aspect, the Protocol places an obligation on state parties to provide for "appropriate remedies" in their domestic legal systems, and to "ensure that [claims for] such remedies are [adjudicated] by competent judicial, administrative or legislative authorities."¹²⁹ Inadequate access to the legal system has been one of the reasons why, before the adoption of the Protocol, women have not been able to translate the legal norms contained in treaties into effective guarantees. By repeatedly highlighting the need that states make legal aid available to women,¹³⁰ the Protocol deals explicitly with this aspect.

128. See African Women's Protocol, *supra* note 1, Preamble (noting that "despite the ratification of the African Charter on Human and Peoples' Rights and other international human rights instruments by the majority of States Parties, . . . women in Africa still continue to be victims of discrimination and harmful practices").

129. *Id.* Art. 25.

130. See *id.* Arts. 8(a), 8(b) (providing legal aid to women).

B. Domestic Non-Legal Measures

While the recognition of the importance of legal redress and legal aid are important first steps towards the realization of women's rights, the Protocol embraces a much more multifaceted and multi-disciplinary approach towards the domestic implementation of its provisions.

The crucial role of education and awareness-raising runs like a golden thread through the Protocol. States are, for example, required to embark on campaigns to educate and sensitize "women and men," by way of public education, to break down stereotyping and culturally engrained patterns of superiority and inferiority¹³¹ and to eliminate "harmful practices through [] formal and informal education and outreach programmes."¹³² Adopting a detailed and practical approach, the Protocol, for example, calls on states to "eliminate all stereotypes in textbooks, syllabuses and the media."¹³³

In one of its most far-reaching provisions, the Protocol highlights that states have to provide budgetary resources to ensure the effective implementation of the rights.¹³⁴ In article 10(3), the Protocol goes even further by introducing—for the first time in such an international human rights instrument—a hierarchy of budgetary priorities: States are required to "take the necessary measures to reduce [the amount allocated towards] military [spending] significantly in favour of spending on social development in general, and the promotion of women in particular."¹³⁵ As it is included in a legal text, this provision should, in my view, be understood as establishing a basis for review by the African Commission, or the African Human Rights Court, of budgetary allocations by state parties. The provision does not invite the Charter-based institutions to substitute their views about specific allocations, but allows them to review allocations already made, particularly with reference to a period of two or more years.

131. *Id.* Art. 2(2).

132. *Id.* Art. 5(a).

133. *Id.* Art. 12(1)(b).

134. *See id.* Art. 26(2) ("States Parties undertake to adopt all necessary measures and in particular shall provide budgetary and other resources for the full and effective implementation of the rights herein recognised.").

135. *Id.* Art. 10(3).

C. Interpretive Guidance

Even if it does not lead to an overhaul of legislation or constitutional amendment, the Protocol provisions create a new frame through which the relevant national law should be viewed, and if necessary, reinterpreted, and adjusted. This may be a more indirect or sweeping influence of the Protocol on national law than its direct application, but its role should not be discounted. The use of the Protocol as an interpretive guide depends on the knowledge and initiative of lawyers, who need to bring these possibilities to the attention of judicial tribunals, and on the keen understanding of judicial officers, who should grasp the opportunities to develop the law in line with the Protocol.

The case of *Ts'epe v. The Independent Electoral Commission and Others*¹³⁶ presents a good example of how international human rights law was used effectively to bolster a legal argument before a national court and to clarify an ambiguity under domestic law. The ambiguity arose from an affirmative action provision in the Election Act of Lesotho, which reserves one-third of the seats in every council election for women, leaving the remaining seats open to be contested by women and men equally.¹³⁷ A male voter argued that this electoral quota violated his right to equality, and contended that the relevant provisions of the Electoral Act should be declared unconstitutional.¹³⁸ The dispute amounted to a legal contest between a formal and substantial interpretation of equality. Finding support in Lesotho's international obligations, in particular CEDAW, and in the SADC Declaration on Gender and Development, the Lesotho Court of Appeal found that the Constitution mandated a substantive approach to equality and upheld the constitutionality of the electoral quota on that basis.¹³⁹ It should be noted that the African Women's Protocol was not

136. *Ts'epe v. The Independent Electoral Commission and Others*, 2005 AFR. HUM. RTS. L. REP. 136, 136 (Lesotho Ct. App. June 2005), available at http://www.chr.up.ac.za/centre_publications/ahlr/2005.html (last visited Nov. 13 2009) (on file with Washington and Lee Journal of Civil Rights and Social Justice) (holding "affirmative action to ensure higher percentage of women in local government permissible under the Constitution").

137. See *id.* at 137 (discussing election law reserving one third of the Council seats for women).

138. See *id.* (discussing appellant's request that election law be held unconstitutional).

139. See *id.* at 149 (finding election law rationally connected to objective to advance greater electoral representation of women).

relied upon or invoked in the case, presumably because it was not yet in force at that time.¹⁴⁰

By contrast, the Protocol is specifically mentioned in *Katakwe v. Hakasenke and Others*.¹⁴¹ However, this case illustrates what often happens: The Protocol is referred to in passing, without clarity about the role or the weight that is sought to be attached to it, leaving one with the impression that the "citing" of the Protocol could just as well have been omitted.¹⁴² This case, a claim for damages arising from the rape of a student by a teacher in his private home, was decided on the basis that the teacher committed a tort by failing in his duty of care to the student.¹⁴³ In his judgment, the presiding officer mentions that counsel for the plaintiff "cited" Article 4 of the Protocol, which requires that all forms of exploitation "shall be prohibited."¹⁴⁴ However, this provision is not integrated either in the restated argument of counsel, or the judgment.¹⁴⁵

In *Katakwe*, the judge further quotes article 4(2) of the Protocol, which places an obligation on state parties to "enact laws to prohibit all forms of violence against women."¹⁴⁶ The formulation of this provision clearly requires domestic action on the part of the state for its effective application or implementation, making it an example of a non-self-executing treaty provision.¹⁴⁷ Similarly, article 14(2)(c) of the Protocol contains very specific grounds on which "medical" abortion should be allowed.¹⁴⁸ On the one hand, it could be argued that the provision is sufficiently precise to

140. Lesotho ratified the Protocol on 26 November 2004. See *List of Countries Which Have Signed, Ratified/Acceded to the African Union Convention on Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, AFRICAN UNION, May 26, 2007, http://www.achpr.org/english/ratifications/ratification_women%20protocol.pdf.

141. *Katakwe v. Hakasenke and Others*, Case No. 2006/HP/0327 J1, J8, Civil Jurisdiction, High Court of Zambia, June 30, 2008 (Judge Musando) [hereinafter *Katakwe case*] (holding that a child under sixteen years of age cannot consent to a sexual relationship with an adult).

142. See *id.* (citing Article 4 of the African Women's Protocol).

143. See *id.* at J7–J11 (discussing the duty of care that teachers owe students and finding the teacher violated that duty).

144. See *id.* at J8 (citing article 4 of the African Women's Protocol).

145. See *id.* at J12 (failing to mention the African Women's Protocol in the Judgment).

146. See *id.* at J1, J8 (citing article 4(2) of the African Women's Protocol).

147. See VILJOEN, *supra* note 12, at 534–35 (discussing the self-executing nature of treaty provisions).

148. See African Women's Protocol, *supra* note 1, Art. 14(2)(c) (authorizing "medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus").

serve, by way of example, as a defense against the prosecution of a medical care worker who performed an abortion on a women who had been raped. By not allowing an abortion under such circumstances, the state would arguably be in breach of its obligation to take all appropriate measures to protect the reproductive rights of women "by authorising medical abortion[s] in cases of . . . rape."¹⁴⁹ On the other hand, the provision could be viewed as non-self-executing, in that it places an obligation on states to take appropriate measures, foremost among which is the adoption of legislation.

Other provisions of the Protocol that may be viewed as more clearly self-executing, in that the specificity of their formulation gives rise to immediately enforceable obligations, could serve as sources of remedial action for litigants and not only as interpretive guidance. An example of a self-executing provision is the requirement that states need to ensure that girls (women under the age of eighteen years) do not take part directly in hostilities.¹⁵⁰ Arguably, if no legislation to this effect is adopted in a particular state, and the involvement of girl-children in hostilities is proven, the state's obligation under the Protocol is precise enough to give rise—at the very least—to a finding that the state failed in its duty to protect this right. It is not inconceivable that a state party's domestic court would find a violation of the relevant provision and order the state to adopt and apply legislation, investigate a case, or pay compensation. Another example of a self-executing provision is the right of a widow "to continue to live in the matrimonial home."¹⁵¹ Arguably, an attempt to force a widow out of the matrimonial home—in the absence of any domestic law on the issue—can be resisted by invoking the right in the Protocol, which should be made operational by way of judicial enforcement of the relevant provision.

149. *Id.*

150. *See id.* Art. 11(4) ("States Parties shall take all necessary measures to ensure that no child, especially girls under 18 years of age, take a direct part in hostilities and that no child is recruited as a soldier.").

151. *Id.* Art. 21(1).

D. State Reporting

According to Article 62 of the African Charter, state parties to the Charter are under an obligation to submit reports to the African Commission, every two years, setting out the measures they have taken to give effect to the rights under the Charter.¹⁵² Similarly, state parties to the Protocol are required to allow inspection of their observance of the African Women's Protocol by submitting periodic state reports for the African Commission's examination.¹⁵³ As they have accepted the Protocol as a substantive supplement to the African Charter, it should be assumed that states party to the Protocol must report on the measures taken to realize the Protocol rights simultaneously with their periodic reports under Article 62 of the Charter. This obligation is spelt out explicitly in the Protocol, mirroring the wording in the "mother text."¹⁵⁴ This provision was probably included for the avoidance of any doubt, and to serve as a reminder to states of their obligation to submit periodic reports. As no additional time frame for reporting is provided in the Protocol, it should further be assumed that the report on the Protocol provisions should be incorporated in the following round of reporting under the Charter for the state concerned, and then every two years thereafter. It is suggested that states that are party to both the African Charter and the Protocol submit one report, but in two parts: Part A dealing with the African Charter and Part B dealing with the provisions of the Protocol.

Despite the inclusion of this obligation, however explicitly, the main problems of non-reporting and late submission of reports under African human rights treaties are likely to occur also with respect to reports under the Protocol.¹⁵⁵ By failing to consistently adopt and publicize concluding observations after examining state reports, the Commission itself has also been responsible for undermining the effectiveness of the state reporting

152. See African Charter, *supra* note 2, Art. 62 ("Each state party shall undertake to submit every two years, . . . a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter.").

153. See African Women's Protocol, *supra* note 1, Art. 26(1) (discussing that reporting legislative measures ensures implementation of the Protocol at the national level).

154. *Id.*

155. See, e.g., Malcolm Evans & Rachel Murray, *The State Reporting Mechanism of the African Charter*, in *THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: THE SYSTEM IN PRACTICE 1986–2006* 49, 52–57 (Malcolm Evans & Rachel Murray eds., 2d ed. 2008) (discussing "[t]he failure of many States to comply with their obligations, and the subsequent—arguably, lack of—reaction by the Commission" with respect to submitting reports in accordance with Article 62 of the African Charter).

procedure. The mere extension of the scope of the rights to be reported upon is therefore no guarantee of their improved implementation.

If anything, reporting under the Protocol poses additional challenges to the Commission. For one thing, there is a need to develop guidelines for reporting to assist states with the required format and content of their reports under the Protocol. At the time of this writing, no such guidelines exist. During the examination of state reports under the Charter, the practice of the Commission has been to leave questions about women's rights to the Special Rapporteur on the Rights of Women. Similarly, with respect to state parties to the Protocol, the Special Rapporteur usually poses a series of questions about women's rights without specific reference to the Protocol. As for state practice with respect to reporting, the reports of state parties to the Protocol almost universally omit any specific discussion on the measures taken to give effect to the Protocol. Women's rights are mostly dealt with as part of the report under Article 18(3) of the Charter.

In the development of these guidelines, the Commission could take into account the existing reporting obligations of states under CEDAW and the AU Solemn Declaration on Gender Equality in Africa. As CEDAW has been ratified by 51 African UN member states,¹⁵⁶ including all state parties to the Protocol, and because *all* AU members are obliged to report under the Solemn Declaration,¹⁵⁷ the extent of potential overlap in obligations is evident. A reporting system could be devised in a way that addresses the recurrent apprehension of states about being overburdened by multiple reporting obligations. Unnecessary duplication should be avoided. One option would be for a state to attach to its Charter/Protocol report any recently submitted CEDAW or Solemn Declaration report. The guidelines for reporting under the Protocol should then stipulate the additional aspects, unique to the Protocol, on which state parties have to report.

Such a solution was opted for in the guidelines for reporting under the African Children's Charter, in an effort to create synergy between states' reporting obligations under the UN Convention on the Rights of the Child and under its African pendant, the African Children's Charter.¹⁵⁸ While the

156. See United Nations, Department of Economic and Social Affairs, Division for the Advancement of Women, <http://www.un.org/womenwatch/daw/cedaw/states.htm> (last visited Oct. 17, 2009) (on file with Washington and Lee Journal of Civil Rights and Social Justice) (listing the States Parties to the CEDAW).

157. See AU Solemn Declaration, *supra* note 21, at ¶ 12 ("Commit ourselves to report annually on progress made in terms of gender mainstreaming and to support and champion all issues raised in this Declaration, both at the national and regional levels, and regularly provide each other with updates on progress made during our Ordinary Sessions.").

158. See *Guidelines for Initial Reports of State Parties to the African Charter on the*

significant extent of overlap between the UN and African treaties relating to children made such an approach workable, the much more substantial difference between CEDAW and the Protocol would arguably pose greater challenges to the introduction of a similar synergy between the reports under these two instruments.

Should such a strategy be followed, a time limit should also be fixed within which the CEDAW or Solemn Declaration report should have been submitted (for example, within the last three years). Alternatively, the state could be guided to update the relevant information. It may further be required that the report should have been of a certain quality, and to provide guidelines as to this aspect.

Because of its relatively limited scope, its targeted provisions and the frequency of reporting (which is required on an annual basis), the AU Solemn Declaration may lend itself better to such an attempt to harmonize reporting. As intimated above, there is an extensive overlap between the issues to be reported upon under the Solemn Declaration and the Protocol. At the same time, the limited scope of the Solemn Declaration leaves much room for additional information to be provided under the many provisions of the Protocol that the Declaration does not cover. Reporting guidelines under the Protocol could therefore require states to submit their most recent report under the Solemn Declaration, and should further stipulate which Protocol provisions still need to be reported on as part of the state report under the Charter/Protocol.

At the sub-regional level, once the SADC Gender Protocol has entered into force, states party thereto also have to submit two-yearly reports on the "progress achieved in the implementation" of the rights in the Protocol.¹⁵⁹ This "progress report" should be directed to the SADC Executive Secretary, who serves as a conduit to transfer these reports to the main political organs of SADC, the Council, and the Summit, for their "consideration."¹⁶⁰ While the SADC Gender Protocol promises more focused reporting by highlighting the requirement that states "collect and analyze baseline data" against which "targets will be monitored,"¹⁶¹ the politicized (rather than

Rights and Welfare of the African Child, 3 AFR. HUM. RTS. L. J. 347, 353 (2003) ("A state party that has already submitted its report to the UN Committee on the Rights of the Child is required to re-submit such report to the African Committee together with a supplementary report devoted to the provisions of the Children's Charter not duplicated in the CRC.").

159. SADC Gender Protocol, *supra* note 35, Art. 35(4).

160. *Id.* Art. 35(5) (stating that the "SADC shall submit progress reports to Council and Summit for consideration").

161. *Id.* Art. 35(3).

quasi-judicial) nature of the monitoring is likely to detract from the effectiveness of the process. In any event, this possibility is rendered nugatory due to the fact that the SADC Gender Protocol only relates to one of the continent's five regions, and because no state reports are likely to be received in the near future since no state has yet to ratify that instrument.

Whatever approach is taken, the guidelines should try to find the balance between brevity and comprehensiveness, something that the existing guidelines under the African Charter fail to achieve.

E. Individual Complaints

In treating individual complaints, the African Charter differs from other international instruments in that it renders the acceptance of the right of individual petition an automatic consequence of ratification or accession.¹⁶² In other words, there is no prerequisite that states party to the Charter have to accept an optional mechanism that allows for individual communications. By contrast, the CEDAW does not allow for a complaints mechanism at all, which prompted the subsequent adoption of the Optional Protocol to the CEDAW, allowing individuals to submit complaints against state parties to the Optional Protocol. The Optional Protocol was entered into force on 22 December 2000. As of 30 June 2009, 18 African states have accepted the right of individual petition.¹⁶³

Despite the fact that women's rights issues could form the basis of complaints to the African Commission, such complaints have only been

162. See African Charter, *supra* note 2, Art. 47 (giving States Parties to the Charter a mechanism to report violations of the Charter by other States Parties to the OAU).

163. The following states have accepted the right to individual petition: Angola, Botswana, Burkina Faso, Cameroon, Gabon, Lesotho, Libya, Mali, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Senegal, South Africa, Tunisia and Tanzania. Interestingly, six of these states have by that date not become States Parties to the African Women's Rights Protocol, namely: Botswana, Cameroon, Gabon, Mauritius, Niger and Tunisia. See Irungu Houghton, *Reviewing the Protocol on the Rights of Women in Africa*, NEWS FROM AFRICA, May 24, 2006, http://www.newsfromafrica.org/newsfromafrica/articles/art_10688.html (last visited Nov. 14, 2009) (on file with Washington and Lee Journal of Civil Rights and Social Justice).

The acceptance of individual complaints in respect of women under the UN system and not under the African human rights system reveals a preference for the global regime on the part for these states. The reasons for this preference remain speculative, but may relate to the lack of awareness of states about the Protocol, or may be a vote of no-confidence in the African mechanism. In any event, this state of affairs cast a shadow over the notion of "African ownership" of the African Women's Protocol.

invoked in a few instances, and then only tangentially to other more prominent allegations.¹⁶⁴

The lack of communications to the African Commission alleging violations of women's rights is one of the reasons why the Protocol was adopted.¹⁶⁵ For this reason, and because the Protocol supplements the normative scope of Charter rights but retains the African Commission as its implementing arm, it should be assumed that individual communications arising from the Protocol may be submitted to the Commission. The Protocol should, in this respect, be contrasted with the African Children's Charter, which established a separate monitoring body, the Committee of Experts on the Rights of the African Child. Evidently faced with a choice between establishing a new supervisory mechanism and extending the substantive basis of the Commission, the drafters of the Protocol opted for the latter.¹⁶⁶ This choice reflects a more realistic approach and may have been informed by factors such as the danger of further institutional proliferation and the difficulties besetting the Committee of Experts in its first few years of operation.

Unfortunately, the African Women's Protocol is not a model of clarity on this issue. In contrast to the explicit provision requiring states to submit reports on the measures adopted to give effect to Protocol rights, the Protocol does not likewise extend the scope of the Commission's protective mandate. In fact, the Protocol provides that the African Human Rights Court "shall be seized with matters of interpretation arising from the application or implementation" of the Protocol,¹⁶⁷ and adds that the Commission shall fulfill this function pending the Court's establishment.¹⁶⁸

It is submitted that the reference to the African Human Rights Court should be understood as an attempt to clarify that the Court indeed has jurisdiction over complaints submitted to it by the Commission arising from the Protocol on that basis, or submitted directly to the Court by individuals in states that have made the declaration under Article 34(6) of the Court

164. See Murray, *supra* note 7, at 259 (stating that of the cases brought before the CEDAW, none specifically related to women's rights and only a few addressed women's rights as a secondary issue).

165. See *id.* at 264 (stating that the Protocol was effected to offer an enforcement mechanism for women's rights outlined in the Charter).

166. See *id.* (finding that the Protocol "wavered between being an interpretation of the [Charter] for women on the one hand, and a collection of some existing international standards on the other").

167. African Women's Protocol, *supra* note 1, Art. 27.

168. *Id.* Art. 32.

Protocol. The need to make this competence explicit came about because the Protocol to the African Charter establishing the Court, which was adopted before the Women's Protocol, understandably does not include the Protocol as part of the Court's substantive jurisdiction.

It is inconceivable that the Commission would not have competence to consider communications alleging violations of the African Women's Protocol. The core rationale for the adoption of the Protocol is the need to ensure that women's rights are protected.¹⁶⁹ One of the means to do so is by way of individual communications (complaints). As a substantive rather than a procedural supplement to the African Charter,¹⁷⁰ the Protocol is superimposed on the existing protective framework of the Commission. The logic of the complementary relationship between the African Charter and the African Women's Protocol requires that the Protocol be read as enlarging the scope of claims that may be submitted to the Commission in order to improve the situation of women. In the absence of any explicit provision excluding the competence of the Commission to do so, the Protocol should be understood to mandate the Commission to examine communications alleging violations of the rights under the Protocol.

It is therefore submitted that individuals in states party to the Protocol are entitled to submit communications to the African Commission. Unfortunately, by 30 June 2009, communications under the Protocol had been finalized by the Commission. It is not clear whether any such "cases" are pending. One of the reasons for the dearth of submissions is the avoidable lack of clarity in the Protocol, which has just added to the numerous other factors already inhibiting the submission of complaints to the African Commission by and on behalf of women.

F. Investigations

Adopting reasoning along lines similar to those advanced above, the Commission's mandate to use "any appropriate method of investigation,"¹⁷¹ is equally applicable with respect to the rights in the African Women's

169. *See id.* Preamble (stating that the Protocol was determined to "ensure that the rights of women are promoted, realised and protected in order to enable them to fully enjoy all their human rights").

170. *See Murray, supra* note 7, at 264–65 (discussing the many instances where the Protocol breaks from the Charter in order to incorporate provisions from other international documents).

171. African Charter, *supra* note 2, Art. 46.

Protocol. The Commission therefore has the competence to undertake fact-finding (on-site) investigations on the basis of complaints received in respect of a state party to the Protocol. By 30 June 2009, no such investigation had been undertaken. However, it should be mentioned that the Special Rapporteur on the Rights of Women has undertaken numerous studies and promotional missions, during which she has created awareness of the Protocol.¹⁷²

G. Reservations

Although neither the African Charter nor the Protocol explicitly provides for the possibility of reservations, international law allows state parties to these and other similarly worded treaties to do so.¹⁷³ While this omission may be a factor explaining the difference in African state practice between the CEDAW and the African Charter and the Protocol, another factor may be that states regard the comparatively lackadaisical attitude of fellow states towards the African system, and weak implementation and follow-up by the African Commission, as indications that reservations are not required. It should also be mentioned that some of the most ardent opponents of aspects of the Protocol, and thus more likely to enter reservations upon ratification, have not yet become state parties.¹⁷⁴ Some of the non-ratifying states—especially those with a majority Muslim population—may indeed have second thoughts about ratifying the Women's Protocol in the light of their experience with reservations under CEDAW.

172. For example, the Rapporteur has collaborated with other partners to conduct a study on poverty amongst women in Francophone West and Central Africa and engaged in a promotional mission on women's rights in Chad, Côte d'Ivoire, and Nigeria. See Activity Report of the African Commission on Human and Peoples' Rights, 2000–2001, AHG/229 (XXXVII), ¶ 24 (detailing the recent activities of the Commissioner of the Special Rapporteur on the Rights of Women).

173. See Vienna Convention on the Law of Treaties Art. 19, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention] (allowing a state or international organization to formulate a reservation to a treaty).

174. For example, Tunisia, Sudan, and other North African Islamic states that have not ratified the Protocol objected to certain provisions of the Protocol because they are fundamentally at odds with *Sharia* law. See Banda, *supra* note 38, at 76–77 (discussing how the ability for a mother to assign her nationality to her child and the divorce provisions under the Protocol were inconsistent with *Sharia* law). See also Houghton, *supra* note 163 (listing states that have not ratified the Protocol).

In any event, the reality is that entering reservations to the Protocol has not manifested itself as a significant impediment to potential realization of the rights in the Protocol. Despite the fact that a number of states raised concerns during the drafting stages of the Protocol,¹⁷⁵ very few converted their misgivings into reservations at the time of ratification.¹⁷⁶

Namibia, South Africa, and The Gambia entered reservations upon ratification of the Women's Protocol.¹⁷⁷ Namibia and South Africa entered a reservation to Article 6(d), which requires marriages to be recorded in writing and registered in order for them to be valid. Namibia's reservation applies "until legislation regarding the recording and registration of customary marriages is enacted." The specificity and limited temporal application of this reservation most likely render it compatible with the object and purpose of the Protocol. South Africa's reservation is not temporary in nature.¹⁷⁸ The text of the reservation argues that according to the law governing customary marriages in South Africa,¹⁷⁹ failure to register customary marriages does not render them invalid, and that "it is considered to be a protection for women married under customary law."¹⁸⁰ It may be argued, however, that the failure to register customary marriage significantly increases the likelihood that women younger than 18 would get married. In that sense, South Africa's reservation may be viewed as

175. See Banda, *supra* note 38, at 76–77 (stating that Algeria, Egypt, Morocco, and Tunisia objected to the use of the word "equal" in describing certain women's rights in comparison with rights of men).

176. Only The Gambia, Mauritius, and South Africa entered reservations to the Protocol. ACHPR.org, Protocol to the African Charter, http://www.achpr.org/english/info/women_prot.htm (last visited Oct. 16, 2009) [hereinafter ACHPR] (on file with Washington and Lee Journal of Civil Rights and Social Justice).

177. See African Human Rights Documents, http://www.chr.up.ac.za/hr_docs/themes/theme39.html (last visited Jan. 31, 2007) (on file with Washington and Lee Journal of Civil Rights and Social Justice) (providing separate ratification instruments by Gambia and Namibia as reservations to the Protocol). See also Jamil Ddamulira Mujuzi, *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: South Africa's Reservations and Interpretative Declarations*, 12 LAW, DEMOCRACY AND DEVELOPMENT 41, (2008) (discussing the meaning and legal implications of the reservations and interpretative declarations to the Protocol).

178. South Africa entered further reservations but they aimed to extend rather than restrict protection and are not discussed here.

179. Recognition of Customary Marriages Act, § 4(9), GG19539 of 2 December 1998 (stating that "[f]ailure to register a customary marriage does not now affect the validity of that marriage").

180. South Africa's Instrument of Ratification to the Protocol Art. 6(d), available at http://www.chr.up.ac.za/hr_docs/documents/SA_instrumentsOfRatification.pdf (last visited Oct. 16, 2009).

striking at a core provision of the Protocol.¹⁸¹ The Gambian Parliament entered a blanket reservation to Articles 5, 6, 7, and 14.¹⁸² Resulting from a sensitization campaign by civil society, in collaboration with the parliamentary committee on women's rights, and profiting from the prospect of the upcoming AU summit meeting to be held in June 2006, the Gambian Parliament decided to withdraw the reservations in March 2006.¹⁸³

In respect to numerous African state parties, the normative force of CEDAW has been eroded significantly due to far-reaching reservations entered by these states. All states that have become state parties to the Protocol are also parties to CEDAW.¹⁸⁴ Three of them (Lesotho, Libya, and Mauritania) reserved part of CEDAW, but did not enter similar reservations when ratifying the Protocol.¹⁸⁵

On 25 August 2004, the Government of Lesotho informed the Secretary-General that it had decided to modify its reservation, which now reads as follows: "The Government of the Kingdom of Lesotho declares that it does not consider itself bound by article 2 to the extent that it conflicts with Lesotho's constitutional stipulations relative to succession to the throne of the Kingdom of Lesotho and law relating to succession to chieftainship."¹⁸⁶ When it became a party to the Protocol, on 26 October

181. See also CEDAW, *supra* note 42, at ¶ 36 (stating that the Committee "considers that the minimum age for marriage should be 18 years for both man and woman"); *id.* at ¶ 39 (stating that "[s]tates parties should also require the registration of all marriages whether contracted civilly or according to custom or religious law").

182. Article 5 of the Women's Protocol deals with the elimination of harmful cultural practices such as female genital mutilation. African Women's Protocol, *supra* note 1, Art. 5. Article 6 of the Protocol, dealing with marriage, includes the requirement of full consent to marriage, the stipulation that 18 years is the minimum age of marriage, and the right of married women to acquire and manage their own property. *Id.* Art. 6. Article 7 requires states to adopt laws to ensure equality between men and women in separation, divorce and annulment of marriage. *Id.* Art. 7. Under Article 14 of the Protocol, states are required to ensure various aspects of women's health and reproductive health, including the right to family planning education and allowing for "authoriz[ed] medical abortion" in cases of rape and incest. *Id.* Art. 14.

183. Interview with Ms. Sainabou Jaye, Programme Officer, Ctr. For Democracy & Human Rights Studies, in Banjul, Gam. (Nov. 15, 2006).

184. See UN.org, State Parties to the CEDAW, <http://www.un.org/womenwatch/daw/cedaw/states.htm> (last visited Oct. 16, 2009) (on file with Washington and Lee Journal of Civil Rights and Social Justice) (listing States Parties to CEDAW and whether the parties entered or revoked a reservation to CEDAW); ACHPR, *supra* note 176 (listing States Parties that have ratified the Protocol).

185. See ACHPR, *supra* note 176 (listing The Gambia, Mauritius, and South Africa as the only states to enter reservations to the Protocol).

186. Modification of the Ratification of the Government of Lesotho (Aug. 25, 2005),

2004, Lesotho did not repeat this reservation, even though the Protocol is quite explicit on this issue.¹⁸⁷ In the generally framed Article 2, states are called upon to commit themselves to "modify the social and cultural patterns of conduct of women and men through public education," to eliminate practices that are "based on the idea of inferiority" of women or on the "stereotyped roles for women and men."¹⁸⁸ Given the centrality of Article 2 in the framework of the Protocol, and the overriding importance of the King and chiefs in Lesotho, where traditional structures still have much currency, it is contended that a reservation similar to the one under CEDAW would have been incompatible with the object and purpose of the Protocol.¹⁸⁹ One may interpret the omission of a reservation as amounting to a change from the previous position that Lesotho held when it was ratifying CEDAW. This is the impression given particularly because both instruments deal with women's rights and specifically address the principles of equality and political participation.¹⁹⁰

http://untreaty.un.org/humanrightsconvs/Chapt_IV_8/withdrawals/Lesotho.pdf (last visited Oct. 7, 2009). The original reservation, entered upon ratification, read as follows:

The Government of the Kingdom of Lesotho declares that it does not consider itself bound by article 2 to the extent that it conflicts with Lesotho's constitutional stipulations relative to succession to the throne of the Kingdom of Lesotho and law relating to succession to chieftainship. The ratification by the Government of Lesotho is subject to the understanding that none of its obligations under the Convention, especially in article 2(e), shall be treated as extending to the affairs of religious denominations. Furthermore, the Government of Lesotho declares it shall not take any legislative measures under the Convention where those measures would be incompatible with the Constitution of Lesotho.

The Secretary-General, *Report of the Secretary-General on the Question of Advancement of Women*, Annex II, Declaration made by the Government of Lesotho, U.N. Doc. A/51/277 (Aug. 7, 1996).

187. Article 9 of the Protocol requires State Parties to ensure "increased and effective representation and participation of women at all levels of decision-making." African Women's Protocol, *supra* note 1, Art. 9(2). As the Protocol contains no exemption for traditional or non-democratic structures, it appears that the exclusion of women from succession to the throne or from the position of chief falls foul of the Protocol.

188. *Id.* Art. 2(2).

189. Bonny Ibhawoh provides a contrary view—that exclusive male claims to chieftaincy do not constitute gender discrimination but rather are cultural, much like the male priesthood—in *Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State*, 22 HUM. RTS. Q. 856, (2000).

190. See CEDAW, *supra* note 42, Arts. 2, 7 (stating under article 2 a desire to "embody the principle of equality of men and women in their national constitutions," and to "grant women equal rights with men" in regards to determining their nationality and the nationality of their children under article 9); African Women's Protocol, *supra* note 1, at Arts. 2, 9 (stating that parties should embody of the principle of equality between men and women in

Libya entered reservations related to Islamic *Shari'ah* law in respect to Articles 2 and 16(c) and (d) of CEDAW.¹⁹¹ Despite provisions in the Protocol with an effect similar to those to which it made reservations to under CEDAW,¹⁹² Libya did not make any reservations to the Protocol.

Upon ratification of CEDAW, Mauritania entered a very broad and encompassing reservation, stating that it only accepts those parts of CEDAW that are "not contrary to Islamic Shariah and are in accordance with our Constitution."¹⁹³ However, when Mauritania ratified the Protocol, it did not restate this reservation.

With minor exceptions, state parties to the Protocol have not eroded their ratification of the Protocol by entering reservations. In one particular instance, that of The Gambia, pressure has been mustered successfully against reservations, resulting in their withdrawal.¹⁹⁴ In respect of the two remaining reservations, the Commission should, during the examination of state reports as part of the unlikely consideration of a relevant communication, or in the form of a resolution, express itself on the compatibility of these reservations with the object and purpose of the Protocol.

IV. Conclusion

The adoption and entry into force by state parties and the domestication of the African Women's Protocol is incomplete. It has not yet been accepted continent-wide, and some state parties still fall short of giving effect to its provisions. While the goal is complete regional acceptance of the Protocol, this should not be attained at the cost of allowing numerous reservations.

their constitutions in article 2, and that State Parties should promote "the equal participation of women in the political life of their countries" in Article 9).

191. See Declarations, Reservations and Objections to CEDAW, Libyan Arab Jamahiriya, <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm> (last visited Oct. 7, 2009) (on file with Washington and Lee Journal of Civil Rights and Social Justice) (providing the reservations by Libya regarding articles 2 and 16 of the CEDAW) [hereinafter CEDAW Reservations]; CEDAW, *supra* note 42, at Arts. 2, 16.

192. Articles 6 and 7 of the African Women's Protocol state that men and women shall be equal during marriage and its dissolution. African Women's Protocol, *supra* note 1, Arts. 6, 7. This could mean equal in terms of rights and responsibilities towards their children.

193. CEDAW Reservations, *supra* note 191.

194. See ACHPR, *supra* note 176 (noting that The Gambia had withdrawn its reservations by May 2006).

Co-existing with CEDAW, the AU Solemn Declaration, the African Children's Charter, and the SADC Gender Protocol, the African Women's Protocol is part of a rapidly changing landscape in which the rights of women are given much more serious consideration than in the recent past. As a regional instrument, the African Women's Protocol speaks to the concerns of women in Africa with greater precision and less ambiguity than CEDAW, but in a less precise and targeted way than the SADC Gender Protocol. From the vantage point of women in Africa, these instruments are mutually reinforcing and provide a menu from which the most relevant and appropriate tactical and strategic choices can be made.

The potential effect of the Protocol depends largely on the knowledge and awareness of its content and the possibilities of its use in advocacy, legal reform, and litigation. Proper domestication and internalization should ultimately lead to greater correspondence between international human rights standards and the lived realities of women. Thus far, this potential has remained largely untapped. The African Commission should take immediate steps to set reporting under the Protocol in motion. Civil society should mobilize around the provisions of the Protocol,¹⁹⁵ and communications alleging violations of its provisions should be submitted to the Commission.

As important as it may be as a legal tool, the role of the Protocol remains limited. It is women's fundamental subordination embedded in socio-economic and cultural structures that underlies the denial of their rights, not the dearth of legal guarantees reaffirming their rights. Obviously, the Protocol will not change this situation overnight, but it may contribute to its gradual reversal.

195. For example, the mobilization of NGOs in Cameroon following the negative reaction to the ratification of the Protocol in May 2009 (in particular, gay rights organization Alternatives-Cameroon and *l'Association pour la Défense de l'Homosexualité*). See Jerina Messie, *Church "Manipulates Public Opinion" on Homosexuality*, BEHIND THE MASK, July 16, 2009, <http://mask.org.za> (discussing how gay rights organizations rallied against the Catholic Church for "deliberately causing confusion" about the Protocol). The archdiocese of Douala organized a protest march against the inclusion of the "right to abortion" and raised the spectre of homosexuals' rights being protected under the Protocol. *Id.*